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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACOB MANDEL, et al.,

Plaintiffs,

v.

BOARD OF TRUSTEES of the CALIFORNIA STATE UNIVERSITY, et al.,

Defendants.

Case No. 3:17-CV-03511-WHO

PLAINTIFFS' OPPOSITION TO JEWISH STUDIES SCHOLARS' MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF [ECF 100]

On October 25, 2017, six non-parties referring to themselves as the "Jewish Studies Scholars" filed a Motion for Leave to File Amicus Curiae Brief.[1] ECF 100 (the "Motion"). Since the Motion does not comply with Local Rule 7-2(a)'s notice requirements, Plaintiffs[2] assume that it is a motion for administrative relief. Regardless, because of the procedural and substantive flaws discussed below, the Motion should be denied.

I. BACKGROUND

With the Motion, six non-parties to the case seek permission "for leave to file an amicus curiae brief in support of the motion to dismiss and motion to strike filed by Prof. Rabab Abdulhadi." Motion at 2:3-5. According to the Motion, Professor Abdulhadi has consented to the filing of both the Motion and the accompanying brief. *Id.* at 2:5-7. The Motion makes no mention of whether the non-parties conferred with the Plaintiffs (they did not) or any of the other Defendants. In addition, in violation of Local Rule 7-11(a), the Motion is not accompanied by either a stipulation or by a declaration that explains why a stipulation could not be obtained.

In the Motion, the six non-parties state that the reason they want to file an amicus brief in this case is to "demonstrate the unacceptability of the so-called 'State-Department Definition of Antisemitism' that plaintiffs seek to employ in establishing the viability of their complaint." Motion at 2:6-8. Of course, they recognize—as they must—that the parties have already addressed this issue. *Id.* at 6:3-5; *see also* Dr. Abdulhadi's Motion to Strike (ECF 44) at 1-5; Dr. Abdulhadi's Motion to Dismiss (ECF 79) at 1:8-10, 14:12-15, 17:18-22; Defendants' Motion to Strike (ECF 81) at 8:1-14; Plaintiffs' Opposition to Defendants' Motion to Strike (ECF 85) at 9:1-10:2; Plaintiffs' Opposition to Dr. Abdulhadi's Motion to Dismiss (ECF 86) at 20:1-11; Plaintiffs' Opposition to Dr. Abdulhadi's Motion to Strike (ECF 87) at 1:1-5:9; Dr. Abdulhadi's Reply in support of her Motion to Strike (ECF 101) at 2:1-3:16; Defendants' Reply regarding their Motion to Strike (ECF 103) at 5:2-6:2, notes 5, 10. To that end, they promise to "not unduly repeat those arguments." Motion at 5:4. The operative word, of course, is "unduly" because two of the four arguments in their proposed

[1] Although the first line of the motion refers to "five Jewish studies scholars" (Motion at 2:2), there are actually six (*id.* at 2:20-5:13).

[2] The term "Plaintiffs" refers collectively to the plaintiffs in this case: Jacob Mandel, Charles Volk, Liam Kern, Aaron Parker, Masha Merkulova, and Stephanie Rosekind.

brief in fact are repeat-arguments that one or more of the Defendants already has made. *Compare* Exhibit A at 10:14-12:6 (arguing the First Amended Complaint misrepresents the State Department definition); *with* Dr. Abdulhadi's Motion to Strike (ECF 44) at 4:9-5:5 (same); *compare also* Exhibit A at 14:9-15:10 (raising Kenneth S. Stern's criticism of the State Department definition); *with* Defendants' Motion to Strike (ECF 81) at 8:9-16 (same).

But the real reason the six non-parties want to make a submission in this case is that they believe that "[t]he present lawsuit is but the latest front in an all-out offensive by groups determined to stigmatize and when possible, suppress advocacy for Palestinian rights and its corollary, criticism of Israeli policies and U.S. support for them." Exhibit A (ECF 100-1) at 4:14-17; *see also* Motion at 2:14-16 (alleging there are "current attempts to redefine [anti-Semitism] for certain political ends" and that "such an effort is a key element of the controversy brought in the current complaint"); *see also id.* at 4 n.1 (stating that a recent study makes findings "all contrary to the picture drawn by The Lawfare Project"); Ex. A at 10:12-13 (referring to "the Lawfare complaint").

II. THE SCHOLARS' MOTION SHOULD BE DENIED

Where an administrative motion fails to comply with Local Rule 7-11(a), it may be denied without reaching the merits. *See, e.g., Tri-Valley CAREs v. U.S. Dept. of Energy*, 671 F.3d 1113, 1131 (9th Cir. 2012) (affirming denial of a motion for administrative relief because of a failure to include a stipulation or declaration explaining why a stipulation could not be obtained as required by N.D. Cal. L.R. 7-11). Here the Motion fails to comply with Local Rule 7-11(a) in at least one critical respect. It is not accompanied by "either a stipulation . . . or by a declaration that explains why a stipulation could not be obtained." The Court would be well within its discretion to deny the motion for this reason alone. *See id.* ("Denial of a motion as the result of a failure to comply with local rules is well within a district court's discretion.").

A court has discretion to deny leave to file an amicus brief where the information proffered is untimely. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, C-01-1351 TEH, 2007 WL 4276552, at *1 (N.D. Cal and E.D. Cal. Nov. 30, 2007); *see also California Trout v. Norton*, No. C 97-3779 SI, 2003 WL 23413688 at *8 (N.D. Cal. Feb. 26, 2003) (finding a request to submit an amicus declaration untimely where applicants could have sought amicus status earlier in the

litigation). Here, non-parties submitted their Motion and proposed brief on October 25, 2017, more than two months after one of the motions they seek to support was filed, and six weeks after Dr. Abdulhadi filed the other motion. The non-parties waited more than four months after Plaintiffs filed the original complaint—which included the State Department definition on which they are focused—before seeking amicus status. Were the Court to grant the Motion immediately, Plaintiffs would have ten days (or less) before the November 8 hearing to evaluate the proposed brief in detail and prepare a substantive response. For these reasons, the Motion should be denied as untimely.

Setting aside the procedural flaws, the Motion also fails on the merits. Where a party seeks leave to file an amicus brief, it bears the burden of showing that its "participation is useful to or otherwise desirable to the court." *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, No. M 02-1486 PJH, 2007 WL 2022026, at *1 (N.D. Cal. Jul. 9, 2007). Here, the non-parties' Motion fails on both accounts. Indeed, the Motion's section entitled "Reasons Why the Motion Should Be Granted" makes no showing as to either required point—it merely provides a number of legal cites and then concludes that if allowed to file their brief, the non-parties "will fulfill 'the classic role of amicus curiae.'" Motion at 5:23:25.

Ostensibly, the non-parties wish to present argument "to demonstrate the unacceptability of the so-called 'State Department Definition of antisemitism.'" *Id.* at 6:6-7. But on this issue, the proposed amicus brief does nothing more than reprise and attempt to amplify arguments the Defendants have already raised in *three* pending Motions which now been fully briefed. As this Court explained in *DRAM Antitrust Litigation*, where the putative amici are "seeking to litigate the issues raised by the actual parties to the instant action," rather than "offering useful or advisory arguments," this is "not consistent with the role of an amicus." 2007 WL 2022026, at *1. Moreover, proposed amici cannot meet their burden of showing that they will provide the Court with help "beyond the help that the lawyers for the parties are able to provide." *Merritt v. McKenney*, No. C 13-01391 JSW, 2013 WL 4552672, at *4 (N.D. Cal. Aug. 27, 2013) (holding amicus briefs may be appropriate where a party is not represented by counsel); *see also Goldberg v. Philadelphia*, No. Civ. A 91-7575 (E.D. Pa. July 14, 1994) ("If the court feels that the parties are adequately represented so that amicus participation is neither necessary nor helpful, it should deny amicus

curiae participation.") Here, the Motion in no way demonstrates how the non-parties' participation would be useful to or otherwise desirable to the Court in its analysis of the already submitted briefing regarding the U.S. State Department's definition of anti-Semitism prompted by Dr. Abdulhadi's motion to strike and her motion to dismiss. Further, there is no reason to believe that a brief submitted by the non-parties will provide help beyond which the *four different law firms* which represent Dr. Abdulhadi are able to provide.

Nor have the proposed amici shown that the brief submitted will be useful or desirable vis-à-vis Dr. Abdulhadi's motion to dismiss. Motion at 2:2-5. With her motion to dismiss, Dr. Abdulhadi put at issue whether there is a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Therefore, any merits-based arguments—such as highlighting a recent study and claiming it reaches conclusions "all contrary to the picture drawn by The Lawfare Project" (Motion at 4 n.1)—are inappropriate here.

The Motion's remaining points all fail to show how the proposed amicus brief will be useful or desirable to the Court in considering Dr. Abdulhadi's motion to dismiss. The Motion argues that the non-parties' knowledge "about the origins, history and *importance of antisemitism* – including current attempts to redefine it for certain political ends" is "highly relevant to the question of whether [the First Amended Complaint] should be dismissed for lack of a legal basis" because the effort to redefine anti-Semitism is "a key element of the controversy brought in the current complaint." *Id.* at 2:12-17 (emphasis added). The non-parties are wrong (in several ways). The non-parties' theories—about what is or is not an appropriate definition of anti-Semitism, what is or is not a "key element of the controversy," or what motivation is behind asserting the claims—are not useful or desirable to the determination of *whether Plaintiffs have stated their claims in the First Amended Complaint* (the "FAC"). Therefore, the Motion should be denied.

Although the Motion fails to analyze Plaintiffs' actual claims, it is helpful to do so here. The FAC alleges that Dr. Abdulhadi and her co-Defendants, under color of state law, deprived Plaintiffs of their First Amendment rights related to both the April 6, 2016 shutdown of the Mayor Barkat and the February 28, 2017 intentional exclusion of Hillel from the "Know Your Rights" Fair. *See* FAC ¶¶ 61-113, 170-81 (re: the Barkat event shutdown); ¶¶ 142-62, 197-211 (re: the exclusion from the

"Know Your Rights" Fair). Plaintiffs' allegations in support of these claims (Counts 1 and 3) do not require alleging a motivation (of anti-Semitism or any other). Therefore there is no way the non-parties' theories on the definition of anti-Semitism could be useful to the question of whether Plaintiffs have stated a claim as to Counts 1 and 3.

Regarding Claims 2 and 4, Plaintiffs allege that Dr. Abdulhadi and her co-Defendants, under color of state law, deprived Plaintiffs—as Jews—of their rights to equal protection related to both events. *See id.* ¶¶ 61-113, 182-96 (re: the Barkat event shutdown); ¶¶ 142-62, 212-227 (re: the exclusion from the "Know Your Rights" Fair). Claim 6 seeks relief under the Declaratory Judgment Act, based on Dr. Abdulhadi's conduct alleged regarding Claims 1-4. *Id.* ¶¶ 244-48. Dr. Abdulhadi is *not* a Defendant as to Plaintiffs' Title VI claim regarding SFSU's hostile environment for Jewish students (Claim 5). The debate over the definition of anti-Semitism is totally irrelevant to the question of whether Plaintiffs have stated their claims against Dr. Abdulhadi. This is because Plaintiffs allege that Dr. Abdulhadi's denial of their equal protection rights was based on their Jewish identity (*see id.* ¶¶ 188, 217), and the only question at issue under Rule 12(b)(6) is whether Plaintiffs have stated a claim.

For all of these reasons, Plaintiffs respectfully request that the Court deny the Motion.

Dated: October 29, 2017

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